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Senate

Statement of Senator Dianne Feinstein

"Opposing the Motion to Proceed on the Asbestos Legislation"

Mrs. FEINSTEIN. Mr. President, as a member of the Judiciary Committee who voted for the bill in committee and worked out two amendments that are substantial, I regretfully rise to urge my colleagues to vote no on cloture on the motion to proceed to this bill. In the course of my remarks, what I hope to do is indicate my reasons for opposing cloture and make some positive suggestions as to how to close the gap on the unresolved issues.

There are only two ways to get a bill on asbestos. I say this to everybody out there who has a legitimate concern and need for a bill. That is, one, unless the two leaders agree or, two, a bill that goes back to the Judiciary Committee and is worked out as a product of that committee's work.

Last July, nearly 9 months ago, the Judiciary Committee passed out a comprehensive asbestos bill. We deliberated and had hearings over several years.

The bill wasn't perfect, but it reflected a substantial step forward in crafting a legislative compromise. A few issues were unresolved. They were to be worked out by members in the intervening time. Since July, labor representatives, defendant companies, insurers, and others have engaged in multilateral negotiations, not only to settle these few unresolved issues, but to renegotiate the entire bill.

The legislation proposed by Senator Hatch, the distinguished chairman of our committee, and Senator Frist, the distinguished majority leader, actually sets the debate backward by taking positions directly contradictory to the will of the majority of the Judiciary Committee. It is a substantially different bill that is on the Senate floor today than was the bill that I voted for in committee.

I don't believe the bill is ready for the floor and I hope to technically explain why. In fact, I have written the chairman of the Judiciary Committee requesting that the bill be returned to committee for future deliberations. We, the Senators serving on that committee, did do our job, and we should be allowed to finish that job and work through the issues necessary to forge a bill that can pass in this body.

Let me explain my concerns. Specifically, the bill Senator Frist proposes to bring to the Senate floor eliminates a crucial startup amendment that guaranteed asbestos victims would continue to have their legal

rights until the trust fund is fully operational. This was a major deletion. It will cost the Trust Fund an additional $5 billion.

Let me read to you from the CBO letter on that point, which is dated today and sent to Senator Nickles. "You" -- meaning Senator Nickles -- "also requested that CBO explain the major differences between our cost estimates for S. 1125" -- that is the bill that came out of committee -- "and S. 2290" -- that is the Hatch-Frist bill on the floor. "On March 24, 2004, in a letter to Senator Hatch, CBO updated its October 2, 2003, cost estimate for S. 1125, principally to reflect new projections about the rate of future inflation, and it assumed a later enactment date for the bill. That letter explains that we now estimate enactment of S. 1125 at the end of fiscal year 2004 would result in claims payments totaling $123 billion over the lifetime of the asbestos fund (about 50 years)."

The bill that came out of committee was originally projected to cost $108 billion. An amendment I made put in a contingency reserve of $45 billion in case more money was needed. What this CBO letter shows is that money would, in fact, be needed. CBO's projections indicate that a $10 billion contingency fund would not be enough to cover the cost. That is major in scope.

The bill we are considering today would cost, according to CBO, $17 billion more than the Committee passed bill. Eleven billion of this increase comes from higher awards values.

Five billion of that $17 billion increase is due to the elimination of my startup amendment. Here is why it costs $5 billion. The startup amendment guarantees that asbestos victims would continue to have their legal rights until the Trust Fund is operational. In other words, they could go to court until the trust fund was fully operational. CBO estimates that the Fund would save $5 billion by allowing the private settlement of these claims during this start-up period. That is the implication of eliminating the Feinstein startup amendment made in the Judiciary Committee.

Secondly, the Hatch-Frist bill, as I have said, reduces the asbestos victims' trust fund's contingent reserve from $45 billion to $10 billion. The reason for the original $45 billion contingent reserve was to ensure the solvency of the Trust Fund if the estimates are wrong. If the reserve is not necessary, it is not used. But if it is necessary, it is there. I have already shown you by this CBO letter that it would likely be necessary. CBO predicts that the $108 billion bill we passed last July would actually cost $123 billion because of revised projections. Thus, at the get-go, CBO predicts the Trust would need an additional $15 billion, which is already greater than the $10 billion reserve in the new bill. So why pass a bill that, at its beginning, is not going to have adequate funds?

Thirdly, this bill wipes out final asbestos settlements and trial court judgments granting victims awards. This was one of the points that was left hanging when we passed the bill out of committee, and the members were supposed to get together and solve this. Well, the members -- at least this member -- didn't get together. But I gather a judge and one member did get together and, up to this point, there is no solution. The bill before us simply says to everybody that has a trial court judgment that that judgment is wiped out. That is wrong.

This bill also prevents individuals from returning to the tort system for 7 years after the administrator starts processing the claims, even if the trust fund goes bust in its first years of operation. In contrast, the bill we passed out of committee said that if there is not adequate money, individuals could revert to the tort system at any time.

Now, I am not going to vote for cloture, but I recognize that 18.8 million U.S. workers were exposed to asbestos between 1940 and 1979. The best way to look at asbestos is tiny spears, smaller than grains of sand, that lodge in your lungs, guts, stomach, and, over a period of time, in your organs. It is bad stuff and it ought to be prohibited. This bill ought to prohibit it, for starters.

Our courts are overloaded with claims arising from these exposures. Individuals have brought more than a half million asbestos suits over the last 20 years against 8,400 companies. Approximately 71 companies have filed for bankruptcy due to asbestos lawsuits.

Moreover, the current system doesn't ensure compensation for the sickest victims. Currently, nonmalignant cases get 65 percent of the compensation awards, compared to 17 percent for mesothelioma, and 18 percent for other causes. That is wrong on its face.

As this tidal wave of asbestos cases goes forward, serious questions remain whether existing victims will ever receive the compensation they deserve. For example, because of the extraordinary influx of claims, the Manville trust is only paying 5 cents on the dollar.

So I am one who believes we need a comprehensive solution to the asbestos crisis so that victims who are truly sick get compensated in a timely and fair manner. I recognize negotiations over the asbestos bill have proceeded at a pace that is satisfying no one, and to advance the debate, I would like to ask the Senate to consider the following core proposals, and let me mention what they are.

The fund must be fiscally prudent. Clearly, it has to have a contingent fund of more than $15 billion. Whether that fund is $20 billion or $25 billion or $30 billion, I think we need to go back in the Judiciary Committee and work the values versus the other provisions in the bill. I showed how eliminating

my startup amendment cost the fund $5 billion. That is not my analysis. That is the CBO analysis.

Second, the risk of a delay in the start of a national asbestos trust fund should not be borne by asbestos victims. What do I mean by that? I pointed out the bill eliminates the startup I authored in committee that permitted asbestos claimants to pursue asbestos claims in court until the administrator of the trust fund certifies the fund is fully operational. The reason this amendment is so necessary is to protect the legal rights of plaintiffs, and it should be restored. Without it, asbestos victims could be left without any recourse if there is a delay in starting up the fund. Under this bill, they cannot go to court. So if the money is not there right upfront or the money is short upfront, they are out in the cold.

The amendment I offered serves as a hammer to get defendant companies and insurers to cooperate with the new trust administrator. And for the third time, I point out, it saves $5 billion, according to the CBO.

I recognize the concern of some in the industry that asbestos claimants who are not yet ill will use the interim period to press a host of lawsuits against defendant companies. To address this, I would propose modifying the Feinstein amendment to allow a 6-month stay on asbestos claims upon enactment, except for those claimants facing life-threatening, asbestos-related illness. Thus, the stay would only apply to those who are not ill. I think that is a way out of the problem. For those who are ill, there would be no stay.

Thirdly, I would like to suggest if claims exceed projections and the trust runs out of money, plaintiffs should have immediate access to the tort system in both State and Federal court. The current proposal on the floor would prevent victims from filing claims for 7 years after the trust starts processing them, even if the trust expires in the first or second year of operation. We cannot leave victims in this kind of legal purgatory.

To address legitimate concerns by defendant companies about forum shopping, I would also like to propose that plaintiffs who return to court, if the trust fund collapses, would only be able to file as a member of a class or as an individual in State court jurisdictions where they were exposed or where they currently reside. This would handle the great bulk of forum shopping, if you think about it.

Fourth, I would like to suggest award values should have a sliding scale in order to reflect the individual circumstances of victims. The current asbestos bill applies a one-size-fits-all solution to asbestos awards. An 83-year-old asbestos victim without dependents and a 37-year-old single mother with three small children would both receive $1 million for mesothelioma under the bill, but if we look at the awards given by

asbestos trusts, such as the Western MacArthur trust, individual circumstances are definitely taken into account.

For example, mesothelioma victims, under that trust, can receive between $52,000 and $4 million, with an average value of $524,000. This sliding scale brings fairness to individual victims' awards. I have talked with the managers of the Western Mac Arthur trust. They believe this half-a-million-dollar average takes care of the younger victims and balances that in a fair way against older victims.

Fifth, award values for the trust should be set in a way that prioritizes compensation for the sickest victims whose illnesses can clearly be traced to asbestos. This is the hobgoblin of this whole thing. All of the companies I have spoken to are concerned the trust will be abused, and it will be abused in this way: That smokers would have access without the defined connection to asbestos. Specifically, I think we should not allow the asbestos trust fund to be overwhelmed by smoking claims. This is a deep and valid concern.

In the committee-passed bill -- and I want to speak to it -- awards in category 7 of the medical values raise the largest specter of uncertainty in terms of smoking claims. This category grants awards to smokers with lung cancer with 15 years of weighted exposure to asbestos but no obvious evidence of asbestos disease, such as pleural plaques or asbestosis.

To prevent these claims from overwhelming the trust resources, I propose title VII, smoking cases, revert to the tort system, both State and Federal court, if the administrator determines at the year-end review that the incidence rates of those smoking claims will exceed projections by greater than 50 percent.

Why do I say that? The tort system historically has been able to handle those cases. So it seems to me if there is a smoking case and it shows neither the evidence of asbestos disease, such as pleural plaques or asbestosis, let a court make that decision. This would deter smokers from misusing the trust fund for illnesses caused by smoking rather than asbestos.

This is the most difficult part of the bill. In all of the medical values and all of the hearings and the medical testimony we heard back and forth, it is clear there is a difficult line of definition here, and that is why the trust fund, which is supposed to be a kind of no-fault fund where a medical valuation can be made quickly and scientifically, may not always be able to make that valuation.

So if the fund is going to be overburdened by smoking cases and the administrator at the end of the year says, Look, we are not going to be able to make next year, he can then file in that year-end review with the Congress the request that those cases go to court. We would give him that

authority. I believe this is a solution to that problem. I am not wed to it, but to my knowledge it is the only one that anyone has come up with so far.

Sixth, a fair asbestos bill must exempt from the trust fund final settlements as well as trial court verdicts that compensate victims. The Hatch-Frist bill fails to do this. Specifically, the bill would overturn any final settlement that "requires future performance by any party." Thus, if an individual received a $1/2 million award 5 years ago to be paid in 10 annual installments, this bill would wipe out the last 5 installments.

Of equal concern, the Hatch-Frist bill would wipe out lawsuits unless they were "no longer subject to any appeal or judicial review before the day of enactment of the act." In other words, this bill would erase any trial verdict favorable to plaintiffs still on appeal. We should not undermine a litigant's reasonable expectation that he or she can pursue a favorable trial court verdict to its conclusion.

I am also concerned the bill would overturn the final bankruptcy settlements that have formed the $2.1 billion Western Mac Arthur trust. Award recipients of Western Mac Arthur, 90 percent of whom are Californians, include 8,000 claimants who will be paid hundreds of millions of dollars in a very few weeks. The MacArthur trust has also set aside funds for 30,000 future claimants. All of this money is taken by this bill and put in the national fund. So this final bankruptcy trust is totally wiped out and 8,000 individuals who are going to be paid in a matter of weeks lose their settlements. It is just not right.

Unlike some other settlements, the Mac Arthur trust places priorities on the sickest patients. A minimum of 80 percent of the awards paid out under the trust goes to asbestos cancer victims. These awards will be based on historical rates of asbestosis awards in California, which are higher than the rest of the nation.

According to attorneys involved with the Mac Arthur trust, almost every present claimant expecting payment under the Mac Arthur trust will do worse under the Hatch bill than under the trust because of the Hatch bill's requirement that collateral sources of compensation be subtracted from any award. Remember, this trust is not the only defendant for many of these plaintiffs. Many of the claimants have cases against other defendants and those are all wiped out as well.

Now, I have policy concerns about wiping out the settlements and the fairness, but it is an open question as to whether such a transfer of assets is constitutional. Let me speak about that for a moment. Legal scholars such as Harvard law professor Elizabeth Warren have argued that the bill's expropriation of money from settlement trusts would violate the takings

clause of the U.S. Constitution, which prohibits the taking of "private property...for public use, without just compensation."

Specifically, there are a number of individuals with a confirmed court order allocating money to them who will have these awards taken away without receiving comparable compensation from the national trust fund. If I have ever heard of a takings case, that is it.

Additionally, the Mac Arthur trust, which is an independent legal entity in its own right, may have a takings claim if its assets are transferred to a national fund without receiving comparable assets in return.

Renowned legal scholar Laurence Tribe takes an opposing view and argues that the conversion of trust assets would be constitutionally permissible. The ultimate outcome of this debate is unknown. But it is clear that the trustees managing the Fuller-Austin and other asbestos trusts have indicated they will file constitutional challenges against the proposed legislation as soon as it is enacted unless changes are made.

I will read from a letter dated July 2, 2003, to me from the Fuller-Austin asbestos settlement trust: "Passage of this legislation undoubtedly will set-off a firestorm of litigation challenging its constitutionality. The Trustees' present view is that their mandates under the Fuller-Austin Trust agreement and the Fuller-Austin plan of reorganization would require them to file litigation to challenge the taking of the Trust's assets and the violation of the rights of its claimants. Other existing trusts doubtless will reach the same conclusion. The resulting litigation will likely take years to resolve. In addition, it will take years to establish the claims handling facility mandated by the bill and for that entity to become operational."

We have $4 billion in this fund from bankruptcy trusts, and $2.1 billion additional dollars from the Western MacArthur trust. So that tells us something about how this bill is going to start up and whether the money is actually going to be there to pay the people.

In this bill, the people lose their right to go to court. It is a little bit diabolical if one thinks about it for a few minutes. That is why the startup amendment I offered in committee was so important, because it said nothing begins until the fund has its money and is operational. Therefore, those people had recourse. Once the start-up amendment was taken out, they had no recourse, and the CBO report says that is a $5 billion cost item right off the top.

Now, I offer the principles as a basis for compromise on this legislation. I offer this as one who sat through the hearings and the medical testimony and committee debates and participated in bipartisan amendments offered on the bill.

Thanks to Goldman Sachs, we ran numbers after numbers and Goldman Sachs has been good enough to run another set of numbers for me. We have changed some of the values to try to meet some of the concerns. I have those numbers with me.

I ask unanimous consent that the Fuller-Austin asbestos settlement letter to me dated July 2 be printed in the *Record*.

I also ask unanimous consent that the CBO report dated as of today to Senator Don Nickles also be printed in the *Record*.

Where we have made some changes -- and I would suggest them -- is in the second class, raising the Hatch-Frist values from $20,000 to $25,000; in class III, raising the values for asbestosis/pleural disease B from $85,000 to $100,000; in class VI, other cancers, going from $150,000 to $200,000; in class VII, giving nonsmokers with 15 years weighted exposure a range of $225,000 to $650,000 -- that is $50,000 more than in the Hatch-Frist proposal; in class VIII, lung cancer with pleural disease, giving nonsmokers a range of $600,000 to $1.1 million, a $100,000 increase; in class IX, giving nonsmokers a range of $800,000 to $1.1 million – a $100,000 increase; and for mesothelioma, the last category, a $1.1 million average award on a sliding scale. These numbers have been run by Goldman Sachs. They total $123.6 billion, as opposed to the $114.4 estimated for the Hatch-Frist proposal.

Because I have not been party directly to any of the discussion, regretfully, the only way I can get my views through, it appears, is through the floor of the Senate. I believe this is much more fair to nonsmokers and I believe the methodology of giving the trust administrator the ability that, if nonsmoker cases rise above a certain percent in the next year, at the end of the previous year the administrator be given the power to put all of those cases into the tort system which will not only act as a deterrent, but will also provide the ability to fund this.

One other point I want to make before I yield the floor has to do with the CBO letter. The CBO letter, in addition to the additional $5 billion that removing my startup amendment would cost the fund, also points out the bill on the floor is different from the bill we passed out of committee because in the bill we passed out of committee, administrative costs would be appropriated from the general funds of the Treasury. That difference increases costs to the fund $1 billion over its lifetime.

So those are the reasons why CBO determined that the Hatch-Frist bill will cost $17 billion more than the Committee-passed bill.

By way of conclusion, I would very much hope this bill will go back to the Judiciary Committee. I very much hope all members of the Judiciary Committee would have input into this bill. Or a bill should be negotiated

between the two leaders, so it is bipartisan. There is no way I see a bill being written in private passing this body. Too many of us have put in too much time to try to get a fair solution to let that happen.

I yield the floor.